

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINA STEWART,

Plaintiff-Appellant,

v

HUBBARD SUPPLY COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 16, 2007

No. 270608

Genesee Circuit Court

LC No. 03-077251-CZ

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order denying her motion to vacate an arbitration award. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The court may vacate an award if the arbitrator exceeded his powers. MCR 3.602(J)(1)(c). An arbitrator exceeds his powers whenever he acts beyond the material terms of the contract from which his authority is derived, or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

To be reviewable, the legal error must have been so material or substantial as to have governed the award, and but for the error, the award would have been substantially different. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 165; 596 NW2d 208 (1999). In addition, the error must appear on the face of the award or in the reasons for the decision, which are substantially a part of the award. *Dohanyos, supra* at 176; *Smith v Motorland Ins Co*, 135 Mich App 33, 40; 352 NW2d 335 (1984). The court cannot review the arbitrator's factual findings, *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999), or substitute its judgment for that of the arbitrator. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). We review de novo the trial court's ruling on a motion to vacate an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

Plaintiff's claim of error is limited to the arbitrator's rejection of her claim that she was subjected to a hostile work environment, principally as a result of sexually derogatory comments made by a coworker, Ronnie Starr.

The elements of a hostile environment claim are: (1) the plaintiff belonged to a protected group, (2) the plaintiff was subjected to conduct or communication on the basis of sex, (3) the conduct or communication was unwelcome, (4) the unwelcome conduct or communication was intended to or did in fact substantially interfere with the plaintiff's employment or created an intimidating, hostile, or offensive work environment, and (5) respondeat superior. *Rymal v Baergen*, 262 Mich App 274, 312; 686 NW2d 241 (2004). The conduct or communication at issue must inherently pertain to sex. *Corley v Detroit Bd of Ed*, 470 Mich 274, 279; 681 NW2d 342 (2004). "[W]hether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke v Everett*, 442 Mich 368, 394; 501 NW2d 155 (1993). Generally, the sexual harassment must be severe and persistent to create a hostile environment. *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 313; 385 NW2d 778 (1986). "[A] single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment." *Radtke, supra* at 395.

The arbitrator's opinion showed that plaintiff and Starr did not get along. Plaintiff testified that was because Starr continuously made comments of a sexual nature throughout her three years on the job. However, the evidence conflicted regarding the nature and extent of Starr's comments. Given that (1) plaintiff testified at one point that Starr made sexually derogatory comments "several times," (2) psychological counseling records reflected that plaintiff mentioned various work-related problems, but she never raised Starr's alleged harassment until after she was terminated, (3) plaintiff did not call as witnesses other employees whom she claimed could corroborate her testimony, and (4) plaintiff could not produce the journal in which she allegedly recorded the problems she encountered at work, the arbitrator rejected plaintiff's testimony as incredible, tacitly found that the sexually inappropriate comments were fewer and farther between than plaintiff claimed, and concluded that, when viewed objectively, they were not so severe and persistent as to establish the existence of a hostile environment. The award does not reflect any error of law by the arbitrator and thus the trial court properly denied plaintiff's motion.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly